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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GUY FRACCOLA,

Petitioner,

-against-

THE CITY OF UTICA; ALFRED BRUNI, AS COMMISSIONER OF PUBLIC SAFETY OF THE CITY OF UTICA; and LOUIS LAPOLLA, AS MAYOR OF THE CITY OF UTICA,

Respondents,

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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39 pp

QUESTIONS PRESENTED

1. May a statutorily tenured civil servant be constitutionally dismissed from public employment by an adjudicator who, instead of personally hearing the evidence, engages in secret, clandestine, ex-parte conferences with the prosecutor for the purpose of discussing the prosecution's version of the evidence being introduced at the ongoing trial?

2. May an adjudicator, who neither personally hears evidence nor has access to the trial record prior to announcing his determination, cure his inherently unconstitutional decision by later reviewing portions of the transcript?

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CITATION OF OPINIONS BELOW

The New York State Court of Appeals denied Petitioner's Motion for Leave to Appeal, without opinion, on September 20, 1988. A copy of the Court of Appeals' decision is attached at Appendix A. p. A-1. The decision of the New York State Court Appeals is reported at 72 N.Y.2d 802, New York Law Reports Advance Sheets No. 563, October 26, 1988. The New York State Supreme Court, Appellate Division, Fourth Department, by decision and order without opinion, dated April 8, 1988, denied Petitioner's motion to that Court for leave to appeal to the New York State Court of Appeals. A copy of the Court's unreported decision and order is attached at Appendix A, p. A-1. The New York State Supreme Court, Appellate Division, Fourth Department by written Opinion and Order dated December 18, 1987, unanimously confirmed the Respondents' decision to terminate the Petitioner's twenty-seven year career as a Utica Police Officer and dismissed the Petition. A copy of said opinion, which is reported at 135 A.D.2d 1112, 523 N.Y.S.2d 292, is attached at Appendix A, p. A-2.

JURISDICTION

The decision of the New York State Court of Appeals was entered on September 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C.§1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section One of the Fourteenth Amendment to the Constitution of the United States. Said section is set out verbatim at Appendix B, p. B-1, and provides in pertinent part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law."

The New York State Statutes at issue herein are Civil Service Law Section 75 and Unconsolidated Laws Section 891, which are each set out verbatim at Appendix B, pp. B-2 and B-7, respectively. Said provisions may be found in McKinney's Consolidated Laws of the State of New York, book 9, Civil Service Law, §75 and McKinney's Unconsolidated Laws of the State of New York, book 65, §891.

PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Guy Fraccola, prays that a Writ of Certiorari issue to review the decision and order entered by the New York State Court of Appeals on September 20, 1988 in an action entitled **Matter of Fraccola vs. The City of Utica**. Said decision and order denied the Petitioner's motion for leave to appeal to the New York State Court of Appeals and finally denied Petitioner's application for a Judgment, pursuant to Article 78 of the New York State Civil Practice Law and Rules (hereinafter "CPLR"), in the nature of mandamus, to review and reverse the Mayor's removal of the Petitioner from his position as a Deputy Chief of the Utica Police Department. The New York State Court of Appeals let stand the Mayor's removal of the Petitioner despite the week long series of private caucus sessions between the Mayor, the prosecutor, and the chief investigator, as to the merits of the case being presented against the Petitioner and the evidence being introduced in support thereof, all of which meetings and discussions were not revealed to the Petitioner nor his defense counsel until long after the Petitioner had been fired.

STATEMENT OF CASE

The Petitioner herein seeks this Court's review of the procedures employed at the post-deprivation hearing conducted by the Respondents for the purpose of confirming the Respondents' prior decision to terminate the vested, twenty-seven year, unblemished, decorated employment of the Petitioner as Deputy Chief of the Utica Police Department and further seeks a judicial order directing the Respondents to reinstate the Petitioner, with lost wages and benefits, to his former position.

A. BACKGROUND

On March 27, 1986, the Petitioner, a highly decorated and honored veteran of the Utica Police Department, was summarily removed from his statutorily tenured position as Deputy Chief of Police by the named Respondent, Mayor LaPolla. This action took place less than one hour after the Mayor had received an illegally appointed Hearing Officer's report finding Deputy Chief Fraccola guilty of alleged criminal conduct for which federal, state and county prosecutors had refused to prosecute the Petitioner. Two fellow police officers, who were charged with the same criminal offenses and whose testimony completely corroborated the Petitioner's, were acquitted of all charges.

The Petitioner was hired by the City of Utica Police Department as a patrolman on June 1, 1959. He was thereafter meritoriously promoted through the Department's ranks to the position of Deputy Chief of Police. Throughout his twenty-seven years of impeccable service on the police force, the Petitioner served with honor and distinction and was the recipient of numerous commendations including the prestigious Superior of the Year Award. (Record, Vol. IX, pp. 355-434).[1]

In January, 1984, a new political regime took office in the City of Utica headed by the Respondent Mayor LaPolla and his controversial political appointee, Respondent Commissioner of Public Safety, Alfred P. Bruni.

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[1]All references to the record refer to the Record on Appeal previously filed with the New York State Court of Appeals.

Prior to his election as Mayor, Respondent LaPolla, during his tenure as a City Councilman, openly and bitterly fought with Police Union President Fraccola on several controversial issues relating to the police labor contract. As a result thereof, Petitioner Fraccola and Respondent LaPolla were, in essence, public adversaries.

Following his Mayoral election LaPolla (through Bruni) cleverly drew Fraccola into numerous unprovoked, unwarranted confrontations with the new administration. As a result of these uninstigated confrontations, the Petitioner was repeatedly threatened with loss of job security ranging from demotion to suspension and dismissal. Included in these confrontations were a dispute with Respondent Bruni over the Deputy Chief's legitimate arrest of a Utica City Councilman (Record, Vol. VI, p. 111); Respondent Bruni's public questioning of the Petitioner's entitlement to overtime pay (Record, Vol. VI, pp. 110-111); and Respondent Bruni's gag order attempting to forbid Deputy Chief Fraccola's public expression of his opinions (Record, Vol. I, pp. 11-13; Vol. VI, p. 116).

During this period of unprovoked altercations, Fraccola (although no longer Union President) was an outspoken supporter of the Police Union's position in its disputes with the Respondents over the City's unsuccessful attempt to illegally change the police department's long standing shift rotation policy (Record, Vol. VI, pp. 109-110); the Chief's entitlement to overtime pay and the City's unsuccessful attempt to have the Chief declared by the New York State Public Employment Relations Board to be a managerial/confidential employee (Record, Vol. VI, pp. 111-116).

As a result of these confrontations, Respondent Bruni, with the Respondent Mayor's knowledge and consent, began the systematic divestment of the Petitioner's rank and authority within the police department through the random and prejudicial reassignment of officers under the Deputy Chief's control to other units. This divestment included the Respondents' complete disbandment of the Organized Crime, Vice and Burglary units which Deputy Chief Fraccola had commanded for many years.

B. HASSAN COMPLAINT

In late March, 1985, one Muhammed Hassan discussed with the Respondent Mayor how he had allegedly been beaten by three Utica Police Officers including the Petitioner. (Record, Vol. V, p. 52). At the Mayor's instructions, Hassan then filed a complaint with Respondent Bruni in which Hassan alleged that, on the night of March 6, 1985, he had been severely and brutally beaten about the head and face by Deputy Chief Fraccola in the presence of Officers Wayne Gentile and Louis Paciello, and later was repeatedly poked in the face by Fraccola in the presence of Officers Gentile and Paciello and the Petitioner's son, Patrick.

The Respondent Commissioner, a retired New York State Trooper, did not take any photographs of, nor otherwise attempt to document Hassan's alleged injuries, despite their purported severity. Instead, and without ever speaking to the Deputy Chief or to the other officers who supposedly witnessed the alleged incidents, (Record, Vol. V, pp. 57-62), the Respondent, in his zeal to criminally prosecute and get back at the Petitioner, immediately attempted to obtain a warrant for the Deputy Chief's arrest. (Record, Vol. VIII, pp. 8-9). Recognizing the tension between the two, no judicial officer would issue a warrant. The Respondent Commissioner, again without ever speaking to the officers to get their side of the story, next went to the District Attorney demanding that he indict and prosecute the Deputy Chief for the alleged brutality. After an independent, thorough investigation, the District Attorney refused. (Record, Vol. V, pp. 71-72; Vol. VIII, pp. 8-9, 15-17; Vol. IX. pp. 434-435).

The Respondent then circumvented the District Attorney and, in his passion to get Fraccola, unlawfully made direct contact with the foreman of the Grand Jury, demanding an indictment against the Deputy Chief. The foreman of the Grand Jury rebuffed the Commissioner's demands. (Record, Vol. IV, p. 73). Bruni then, over vigorous objections from the Chief of Police and the Police Union, immediately (and in violation of the Police Union contract) unilaterally amended the Police Department's Book of Rules so as to strip the Chief of Police of all authority with respect to the investigation of Hassan's Complaint and delegated to himself the sole authority to prefer Civil Service charges against the Petitioner.

(Record, Vol. VIII, pp. 29-30). He then launched a personal and so called "internal" investigation into the March 6, 1985 incident. As part of this investigation, the Commissioner ordered the three officers, under penalty of suspension, and in violation of their constitutional rights, to immediately give sworn statements regarding the incident in question, despite the fact that each of the officers had previously filed proper, written, signed, "Special" reports and the Deputy Chief had voluntarily taken (and passed) a lie detector test, all in compliance with departmental policy. (Record, Vol. V, pp. 39-44; 63-74; Vol. IX, pp. 331-333). Bruni openly stated that he intended to use the illegally demanded statements in a criminal prosecution of the Deputy Chief and his fellow officers.

The Commissioner also provided the FBI, the United States Department of Justice, the New York State Attorney General's office and the State Moreland Act Commission on police brutality with his entire investigatory file. (Record, Vol. V, pp. 74-75; 85-87; Vol. IX, pp. 334-345). These governmental agencies, however, after a complete and exhaustive review of the evidence presented by the Respondent Commissioner, and after conducting their own independent investigations, **refused to prosecute**. (Record. Vol. V, pp. 85-87; Vol. IX, pp. 434-440).

Following the many months which it took these professional law enforcement agencies to conclude that there was no basis for prosecution, the frustrated Commissioner once again demanded that the three officers waive their constitutional rights and provide him with sworn, written statements, which he again blatantly told the officers he would use against them as he saw fit. When the officers attempted to protect their constitutional rights by offering to provide sworn statements on the condition that they be allowed to state that they were doing so against their will, Officers Gentile and Paciello were summarily suspended, without pay, for eleven days each and the Deputy Chief was publicly reprimanded.

As a result of this second demand for waivers of immunity, the Police Union, on behalf of the three officers involved, filed an Order to Show Cause against the City, seeking to enjoin the Commissioner from summarily disciplining the Deputy Chief, Officer Paciello and Officer Gentile in retaliation for the exercise of their constitutional rights and from otherwise violating said officers' rights. (Record, Vol. I, p. 16; Vol. V, pp. 70-71). This litigation resulted in the New York State Supreme Court suggesting that the Commissioner annul the officers' suspensions and not conduct his interviews until after first advising the officers of their rights and the effect of signing a waiver. (Record, Vol. I, pp. 72-78; Vol. V, pp. 70-71). Notwithstanding the Court's direction and the three Officers' continued willingness to provide statements and to explain their side of the story, the Respondent Bruni then refused to allow the officers to give any statements, claiming that such statements were rendered useless by the aforesaid Court decision in that they could not be used to criminally prosecute the Deputy Chief and his fellow officers.

C. DISCIPLINARY CHARGES

On or about January 24, 1986, and only after his year long desperate attempt and complete failure to get any law enforcement agency to criminally prosecute the Deputy Chief and his fellow officers, Respondent Bruni called a news conference and, with photographers present, served a battery of police brutality charges upon the three officers. (Record, Vol. I, pp. 33-37). At the same time, and without ever being told what evidence the City had against them or ever being allowed to fully, completely and orally explain their version of the facts, all three officers were summarily suspended from duty, without pay. (Record, Vol. I, p. 38).

On or about January 31, 1986, the officers each filed Answers to the charges denying the allegations contained therein and requested a fair and impartial hearing pursuant to Section 75 of the New York State Civil Service Law. (Record, Vol. I, p. 39, Appendix B, p. 2). The officers also filed formal written objections to the Respondents' appointment of John Clyne, a retired Albany County Criminal Court Judge, as the Hearing Officer, on the basis that Clyne was not ever a "deputy or other employee of the removing body" as required by Section 891 of the Unconsolidated Laws of the State of New York.

(Record, Vol. I, p. 40; Appendix B, p. B-7). Despite these objections, the Commissioner refused to appoint a Hearing Officer in compliance with the Unconsolidated Laws and the appointed Hearing Officer refused to disqualify himself.

A hearing on the charges against Deputy Chief Fraccola, pursuant to Section 75 of the New York State Civil Service Law, began on February 24, 1986. Thirty-six witnesses testified: eleven for the prosecution, and twenty-five for the defense. (Record, Vol. II - VIII). On February 28, 1986, the hearing closed without the Respondent Mayor ever having attended or testified, and without any indication whatsoever during the hearing that the Mayor, and not Bruni—the statutorily authorized appointing and removing officer for the Utica Police Department—was going to decide the case. After the hearing closed, the Respondent Commissioner announced through the media that, as a result of his own personal, in depth involvement in the investigation and institution of the pending charges, upon receipt of the Hearing Officer's recommendation, the final decision was going to be made by the Respondent Mayor. The Commissioner further announced that a finding of guilt on any of the charges against any of the officers would automatically result in that officer's immediate dismissal from the Utica Police force. (Record, Vol. I, pp. 19-20).

On March 26, 1986, at approximately 9:00 AM, the report and recommendation of the Hearing Officer was received by the Respondent City of Utica. (Record, Vol. I, p. 60) Although the report found the Petitioner guilty of some of the charges, it specifically found the Petitioner not guilty of assault and menancing—the two most serious charges against him—as well as innocent of the criminal solicitation and criminal conspiracy charges. (Record, Vol. I, pp. 45-47). In addition, the report found the other two officers innocent of all charges. (Record, Vol. I, p. 47). Within forty-five minutes of their receipt of the Hearing Officer's report, the Respondents jointly conducted a televised news conference at which time the Petitioner, a highly decorated veteran with twenty-seven years of unblemished service, was summarily discharged by the Respondent Mayor.

It was not until Thursday, March 27, 1986, the day after the Petitioner's public removal, that only the bare transcript of the five day, post-deprivation hearing was for the first time delivered by the court reporter to the Respondents. (Record, Vol. I, pp. 50-51). None of the nearly fifty documentary exhibits which were admitted at the hearing accompanied the transcript. The Petitioner's personnel record was returned directly to the police department and all of the exhibits introduced by the Petitioner were returned directly to Petitioner's counsel. Consequently, the only exhibits which the Mayor could have reviewed, if he reviewed any, were those exhibits introduced by the prosecutor.

D. PROCEEDINGS BELOW

The Petitioner sought judicial review of the Respondent's decision to dismiss him from employment by serving and filing a Petition for an Order in the nature of mandamus, pursuant to Article 78 of the New York State CPLR. In response to the Petition, the Respondent Mayor filed a sworn affidavit in which he stated that not only was his decision to fire the Petitioner made prior to his receipt of the hearing transcript and exhibits but that such decision was based entirely upon his daily, ex-parte, extra-judicial conferences with the prosecutor and the Public Safety Commissioner throughout the course of the hearing. (Appendix C, pp. C-1 - C-2). Upon review, the Appellate Division, Fourth Department held that the Mayor's admitted error, in failing to review the hearing transcript and exhibits prior to issuing and imposing his decision, was "cured" by his aforesaid ex-parte communications with the prosecutors and his alleged review of the over nine hundred page transcript, sans any of nearly fifty hearing exhibits, in the days following the public announcement of his determination as to both the charges and the penalty imposed upon the Petitioner. (Appendix A. pp. A2- A3). Both the New York State Supreme Court, Appellate Division and the New York State Court of Appeals denied motions to each Court by the Petitioner for leave to appeal the aforesaid decision to the Court of Appeals and thereby affirmed the Appellate Division's holding. (Appendix A, pp. A1-A2).

The failure of the Respondents to afford the Petitioner even the barest modicum of procedural due process as required by the Fourteenth Amendment to the United States Constitution was raised in each the initial Article 78 Petition, the brief and argument to the New York State Supreme Court Appellate Division, the motion to the Appellate Division to grant permission to appeal to the New York State Court of Appeals and the subsequent motion to the Court of Appeals for leave to appeal. Each of the aforesaid New York State courts determined the Constitutional issue by simply affirming and refusing to review the holding that a decision maker's reliance upon illegal, ex-parte conferences with a prosecutor throughout the course of a post-deprivation hearing is a constitutionally sufficient basis upon which to base factual determinations and to deprive a citizen of his vested property rights in retaining his public employment position.

REASONS FOR GRANTING THE WRIT

This Court has definitively held, in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1984), that the existence of a substantive property right in continued public employment must be determined by a review of state law, 470 U.S. at 538. *See further, Board of Regents v. Roth*, 408 U.S. 564, 576-578 (1972). The constitutionally adequate procedures by which such a state-created substantive right may be diminished or extinguished are, however, to be determined by federal law. *Loudermill*, at 541.

Section 75 of the New York State Civil Service Law, which is set out in full at Appendix B, p. B-2, provides that no public employee who has successfully completed his probationary term may be removed from his position "except for incompetency or misconduct shown after a hearing upon stated charges". The Petitioner herein, having completed his probationary period in 1960, thus had more than a "mere expectation" of thereafter retaining his job, but in fact had a "legitimate claim of entitlement to the position" under New York State Law. As such, federal requirements of due process mandated that the Respondents herein employ constitutionally sound procedures both before and after depriving the Petitioner of the substantive right. *Loudermill*, 470 U.S. at 547-548; *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Paul v. Davis*, 424 U.S. 693 (1976); *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

In *Loudermill*, this Court weighed the competing interests of the public employer in the expeditious removal of unsatisfactory employees and the public employee's significant interest in retaining his means of livelihood, and determined that the procedure constitutionally due prior to the suspension without pay or termination of a public employee's position is "oral or written notice of the charges against him, an explanation of the employer's evidence and an opportunity to present his side of the story". *Loudermill*, 470 U.S. at 546, citing *Arnett v. Kennedy*, 416 U.S. 134, at 170-71 and 195-96 (1974) and *Goss v. Lopez*, 419 U.S. 565 at 581 (1975). The Court's rationale for its holding that no elaborate hearing was required prior to the deprivation of a public employee's position was that the opportunity existed for a full and fair judicial or administrative hearing subsequent to the deprivation. *Loudermill*, 470

U.S. at 545; see also *Boddie v. Connecticut*, 401 U.S. 371 (1971) ("the formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings"); *Mathews v. Eldridge*, 423 U.S. 319 (1976) ("something less" than a full evidentary hearing is sufficient prior to an adverse administrative determination).

In the present case, while there is a significant question as to the Respondents' compliance with even the minimal notice and opportunity to respond requirements prior to the Petitioner's suspension without pay, the procedural failure contested herein is the Respondents' admitted reliance upon nothing more than the ex-parte conferences which admittedly took place between the adjudicator, the prosecutor and the chief investigator throughout the post-deprivation hearing as the sole basis for determining the propriety of the previous deprivation.

This Court has consistently held that "a fair trial in a fair tribunal is a basic requirement of due process", and that, in addition to the constitutional unacceptability of a biased decision maker, "our system of law has always endeavored to prevent even the probability of unfairness". *In Re Murchison*, 349 U.S. 133 (1955). A fair, unbiased decision maker and the avoidance of any appearance of impropriety or prejudgment are required in administrative as well as judicial tribunals. *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Tumey v. Ohio*, 273 U.S. 510 (1927). However, the mere combination of investigative and adjudicative functions in a single administrative body, without more, has been held by this Court to not create an unconstitutional risk of bias sufficient to constitute a denial of due process. *Withrow v. Larkin*, 421 U.S. 35 (1974); *F.T.C. v. Cement Institute*, 333 U.S. 683 (1947).

In *Withrow* and *Cement Institute*, the Court's rationale that an adjudicator's mind cannot be said to be "irrevocably closed" simply because of his exposure to ex-parte information ascertained as a result of his own personal investigation of the same charges he is later required to adjudicate, was based upon the existence and prophylactic effect found to be inherent in the charged party's ability

to present at a full, post-deprivation hearing, any and all evidence it may deem relevant to persuade the adjudicator to the contrary. *F.T.C. v. Cement Institute*, 333 U.S. at 701; *Withrow*, 421 U.S. at 47-55 ("The mere exposure to evidence presented in non-adversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing").

In the context of administrative adjudication, it has further been established that the constitutional dictates of due process do not require an agency head who participates in making the ultimate decision to be the same person who actually hears the evidence. *Ramspe v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953). While the function of presiding over hearings may thus be delegated, such delegation assumes that the responsible adjudicator will base his ultimate decision "solely on the legal rules and evidence adduced at the hearing". *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970); see further *United States v. Abilene and Southern Ry. Co.*, 265 U.S. 274, 288, (1924) ("nothing can be treated as evidence which is not introduced as such"); *Ohio Bell Tel. Co. v. P.U.C.*, 301 U.S. 292 (1937).

In *Morgan v. United States*, ("Morgan I") 298 U.S. 468 (1936), a "hearing", required in that case by the Packers and Stock Yard Act, was defined by this Court as "the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given". *Id.* at 480-481. The Court went on to specifically hold that "there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them". *Id.* at 481-482. *See further*, Transcript of Speech by Justice Rehnquist to the American Bar Association, Section of Administrative Law, Bicentennial Institute, March 18, 1976, pp. 98-106 ("Let us assume for the sake of argument that the decision handed down by the Supreme Court is an entirely reasonable one, and is fully supported by the opinion of that Court... . There would nonetheless be a feeling of disenchantment I think with this thoroughly reasonable product, if one had the suspicion that none of the nine justices who joined in it had ever done anything but sign their name to it and that

perhaps it had originated in some distant beehive of staff activity several levels below that of the justices themselves..."). It cannot therefore be said that the end result, even if supported to some degree by a later review of the actual evidence, can justify the illegal means used to arrive thereat, i.e. on the sole basis of information not presented in an adversarial format with the all the attendant opportunity to rebut, challenge, and argue against same. *See*, Douglas, *We The Judges*, p. 354 (Doubleday, 1956) ("A first principle of Anglo-American Jurisprudence...basic to the conception of due process in the procedural sense [is]...that the ends do not justify the means").

This Court's decision in *Morgan IV* is not to the contrary. The Court there held that the mental process by which a decision maker arrives at his decision will not be probed on review. *United States v. Morgan*, 313 U.S. 421-422 (1941). The Court in that case was faced with an agency-head adjudicator who in fact had access to and an opportunity to review the voluminous evidence established at the administrative hearing. From simply the availability of that opportunity the Court assumed administrative adjudicators, similar to judges "to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on its own circumstances". *Morgan IV*, 313 U.S. at 421. Despite this clear rule, there can be no question that ex-parte communications made in an attempt to influence a decision maker's determination in a pending case are blatantly illegal, even in an administrative setting. *PATCO v. Federal Labor Relations Authority*, 685 F.2d 547 (D.C. Cir., 1982) ("We think it a mockery of justice to even suggest that judges or other decision makers may be properly approached on the merits of a case during the pendency of an adjudication. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decision makers through ex-parte communications"); *Sangamon Valley Television Corp. v. United States*, 269 F.2d 221 (D.C. Cir., 1959) ("improper approaches" made by president of one television channel applicant to FCC members, during the pendency of rule making proceeding to determine appropriate shift of channels, resulted in invalidation of commission action); *see further, Pillsbury Co. v. F.T.C.*, 354 F.2d 952 (5th Cir., 1966) (involving improper attempts by a congressional committee to influence ongoing anti-trust adjudication).

No opportunity for an independent review of the evidence, as existed in *Morgan IV*, was ever available to the Respondent Mayor herein. This is the major and significant distinction between the present case and those previously decided by this Court wherein an adjucator's exposure to ex-parte information was not considered a violation of due process. Here the Petitioner never had an opportunity to present his side of the story to the Mayor prior to the Respondent reaching and publicly announcing his determination as to both disputed facts and appropriate penalty. The Mayor admitted, in a sworn statement, that his decision was based upon the daily, closed-door reports of the prosecutor and the Commissioner of Public Safety, whose own involvement in the investigation of the charges required him to delegate his statutorily appointed decision making authority. As the Petitioner had no knowledge of these daily conferences, he was denied any opportunity to meaningfully present his evidence to the one person with the obligation to weigh and determine the veracity of same. In addition, since the Mayor was in essence the prosecutor's and the Commissioner's boss, and the case involved highly publicized charges against a very vocal, very prominent political opponent of the Mayor, these conferences clearly could not have presented the day's evidence in an even slightly impartial light, let alone in the same manner it would have been presented by an adversary to a truly unbiased decision maker.

The Mayor further claimed in his sworn affidavit that he "immediately" reviewed the hearing transcript "over the next few days" after his public dismissal of the Petitioner. In light of the rule in *Morgan IV*, we must presume the truth of the Mayor's claim that he spent sixteen to eighteen hours over the weekend following his publicly broadcast determiniation of the Petitioner's guilt, reviewing the transcript of the hearing. Even assuming that, there is clearly no basis for his claim that he "fully reviewed all of the appropriate material", as the extensive evidentiary exhibits which were admitted by the hearing officer were never in the Mayor's possession. The purpose of introducing these exhibits was therefore clearly and completely defeated. The fact that the Mayor never saw fit to even request production of these exhibits, which included, among other things, deposition transcripts, the Petitioner's complete personnel file, and contradictory, sworn statements filed by the so-called eye witnesses to the events in question, evidences his predetermination

of the issues, and his "irrevocably closed" mind which resulted from the clandestine conferences in which his underlings clearly sought to convince him of how well they were presenting a case against this influential rival.

The written report of the hearing examiner, which merely lists the witnesses who testified and then summarizes, into less than two pages, two of the numerous different versions of the events in question which were testified to in over nine hundred pages of transcript, again, presuming the truth of the Mayor's claim that he reviewed same, cannot, in light of the total circumstances presented here, satisfy the constitutional requirement that an adjudicator "must consider and appraise the evidence which justifies" his determination. *Morgan I*, 298 U.S. at 482. The Mayor's constitutional obligation was to base his determination upon an independent review of all the relevant evidence. This duty cannot be fullfilled by listening to the obviously biased version of the evidence provided only by the prosecutor and the chief investigator, without any input whatsoever from the charged party, and later, after the fanfare of a public, media-event proclamation of guilt and dismissal, summarily and haphazardly reviewing indiscriminate portions of the evidence.

The Respondents here have simply gone through the motions, providing nothing more than the appearance of a fair hearing, which hearing obviously began with the premise, as asserted twenty years ago by the Rolling Stones, that "every cop's a criminal", to achieve the pre-determined goal of stripping the Petitioner, a prominent, vocal, political opponent, of the constitutionally protected public employment position in which he had honorably, capably and proficiently served for twenty-seven years. The constitutional mandate that the procedure due in any given situation must reflect substance over form, *Chicago B & Q Railroad Co. v. Chicago, Ill.*, 166 U.S. 226, (1897), requires that the Respondents' illegal decision be reversed and that the Petitioner be restored to the public employment position from which he was unconstitutionally dismissed.

CONCLUSION

Wherefore the Petitioner respectfully prays that a Writ of Certiorari issue from this Honorable Court to review the Judgment of the New York State Court of Appeals in the action titled *Matter of Fraccola v. City of Utica*. In the event that the Petition is granted, Petitioner prays that the Judgment of the Court below be reversed, that the matter be remanded and that the lower Court be directed to issue a Judgment pursuant to Article 78 of the New York State CPLR directing the Respondents to immediately reinstate the Petitioner to his position as Deputy Chief of the Utica Police Department, with full back pay, interest and benefits from the date of his suspension to the date of his reinstatement, less any income or compensation earned from an alternate occupation during said period; and directing the entry of such other and further relief as to this Court seems just, equitable and proper.

DATED: December 15, 1988 RESPECTFULLY SUBMITTED,

Rocco A. DePerno, Esq.
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APPENDIX A

Mo. No. 643

In the Matter of Guy Fraccola.

Appellate,

vs.

The City of Utica, et al., & c.,

Respondents.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

Decision Court of Appeals Sep. 20, 1988

APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

1176/87

PRESENT: DILLON, P.J., PINE, LAWTON, DAVIS, JJ.

Matter of Guy Fraccola, Petitioner,

v.

The City of Utica, Alfred Bruni, as Commissioner of Public Safety of the City of Utica, and Louis LaPolla, as Mayor of the City of Utica, Respondents.

The above named Guy Fraccola having duly moved before this court for an order granting leave to appeal to the Court of Appeals from the order of this court entered December 18, 1987.

Now, after reading and filing the affidavit of Rocco A. DePerno sworn to February 23, 1988, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, the opposing affidavit of Armond J. Festine sworn to March 4, 1988, and due deliberation having been had thereon.

It is hereby ORDERED, That said motion be and the same hereby is denied.

Entered: April 8, 1988

CARMEN S. LEONE, Clerk

1176. (Oneida Co.) — Matter of Guy Fraccola, Petitioner, v The City of Utica, Alfred Bruni, as Commissioner of Public Safety of the City of Utica, and Louis LaPolla, as Mayor of the City of Utica, Respondents. — Determination unanimously confirmed and petition dismissed without costs. Memorandum: Petitioner appeals from the determination of Mayor Louis LaPolla of the City of Utica which removed him from his position as deputy chief of the Utica Police Department. He argues that the appointment of the hearing officer, John Clyne, was invalid because Clyne was not an employee of the Department of Public Safety, as required by Unconsolidated Law §891. Although that section has been applied in this situation (*see*, Matter of Vano v McGuire, 70 AD2d 540), strict compliance was impossible here because of petitioner's high position in the Utica Police Department. Petitioner had a close relationship with the Chief of Police, who therefore could not act as hearing officer and the Commissioner of Public Safety properly disqualified himself because his actions during the investigating phase of the matter showed bias against petitioner (*see*, Matter of Edgar v Dowling, 96 AD2d 510, 511; Matter of Sander v Owens, 82 AD2d 968, 969). The only remaining candidates were subordinates. We hold that respondent City properly proceeded under Civil Service Law §75 in appointing John Clyne, a retired County Judge from another county. He had the background and ability to be a fair hearing officer, and actual compliance with McKinney's Unconsolidated Laws of NY §891 was impossible (*cf.*, Cirasuolo v Hasenauer, 64 AD2d 860, *lv denied* 45 NY2d 713).

Petitioner also contends that, because the Mayor did not have a copy of the hearing transcript prior to rendering his determination, the Mayor failed to review the record independently (Civil Service Law §75 [2]; Unconsolidated Laws §891) and his determination must be annulled. The Mayor in an affidavit asserts that he reviewed the transcript the day after he made his determination and that it confirmed what he had already been advised by the Corporation Counsel, who had informed him daily of the evidence introduced at the hearing. The Mayor further averred that he fully reviewed the appropriate material. In view of the Mayor's review of the transcript and his unequivocal assertion that after such review he adhered to his original determination, we hold that the error was cured (*cf.*, Matter of Vano v McGuire, *supra*). We further hold that, contrary to petitioner's assertions, the determination was supported by substantial evidence (300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 180) and that his dismissal was appropriate (Matter of Pell v Board of Educ., 34 NY2d 222, 237).

We have examined petitioner's remaining contentions and find them to be without merit. (Article 78 proceeding transferred by Order of Supreme Court, Oneida County, O'Donnell, J.) Present: Dillon, P.J., Callahan, Pine, Lawton, Davis, JJ.

APPENDIX B

AMEMNDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States or under any State who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States,shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may be a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insur-

rection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TITLE B — REMOVAL AND OTHER DISCIPLINARY PROCEEDINGS

Sec.

75. Removal and other disciplinary action.
75-a. Civil service proceeding; commencement upon alleged violation of certain provisions of the labor law relating to police officers.
76 Appeals from determinations in disciplinary proceedings.
77. Compensation of officers and employees reinstated by court order.

§ 75. Removal and other disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who is an honorable[2] discharged member of the armed

[2] So in original. Probably should read "honorably".

forces of the United States having served therein as such member in time of war as defined in section eight-five of this chapter, or who is an exempt volunteer fireman as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee in the state service holding a position in the non-competitive class other than a position designated in the rules of the state civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into state service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continous service in such position in the non-competitive class.

2. Procedure. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization, and shall allow him to summon witnesses in his behalf. The burden of proving in-

competency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished him without charge.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than three years after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and decribed in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

L.1958, c. 790, § 1; amended L.1960, c. 312, § 1; L.1962, c. 645, § 1; L.1965, c. 738, § 1; L.1970, c. 942, § 1; L.1978, c. 240, § 1.

TITLE B — REMOVAL AND OTHER DISCIPLINARY PROCEEDINGS

§ 75. Removal and other Disciplinary action

1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph (b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

[See main volume for text of (a) and (b)]

(c) [Eff. July 1, 1988. Par. (c) in main vol. eff. until July 1, 1988.] an employee holding a position in the non-competitive class other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continous service in such position in the non-competitive class, or

(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

[See main volume for text of 2]

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct complained of and described in the charges provided, however, that such limitation shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

(As amended L.1983, c. 774, § 1; L.1984, c. 710, § 1; L.1985, c. 842, §§ 1, 2; L.1986, c. 439, § 2.)

CHAPTER 9 — REMOVAL OF CERTAIN POLICEMEN

Sec.
891. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state.

§ 891. Removal of policemen serving in the competitive class of civil service in the several cities, counties, towns and villages of the state

A policemen serving the the competitive class of civil service in any city, county, town or village of the state, any provision of law, rule or regulation to the contrary notwithstanding, shall not be removed from his position except for incompetency or misconduct shown after a hearing upon due notice upon stated charges, and with the right to such policeman to be represented by counsel at such hearing and to a judicial review in accordance with the provisions of article seventy-eight of the civil practice act.[3] The burden of proving incompetency or misconduct shall be upon the person alleging the same. Hearings upon charges pursuant to this act[4] shall be held by the officer or body having the power to remove the person charged with incompetency or misconduct or by a deputy or other employee of such officer or body designated in writing for that purpose. In case a deputy or other employee is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body, and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision.

L.1940, c. 834.

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[3] Civil Practice Act § 1283 et. seq. [Now CPLR article 78].

[4] This section.

APPENDIX C

SUPPORTING AFFIDAVIT PP. 85-86

STATE OF NEW YORK SUPREME COURT COUNTY OF ONEIDA

Index No. 86-1877
AFFIDAVIT IN OPPOSITION

IN THE MATTER OF THE APPLICATION OF GUY FRACCOLA

Petitioner,

FOR A JUDGEMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-against-

THE CITY OF UTICA: ALFRED BRUNI, as COMMISSIONER OF PUBLIC SAFETY, OF THE CITY OF UTICA; and LOUIS LAPOLLA, as MAYOR OF THE CITY OF UTICA,

Respondents.

STATE OF NEW YORK)
) ss:
COUNTY OF ONEIDA)

LOUIS LAPOLLA, being duly sworn, deposes and says:

1. That I am the duly elected and acting Mayor of the City of Utica. That I am fully familiar with all of the matters pertaining to the disciplinary proceedings against Petitioner Guy Fraccola.

2. That my appointed Commissioner of Public Safety, Alfred Bruni and my appointed Corporation Counsel, Armond J. Festine, kept me advised on a daily basis of the evidence occurring at the disciplinary hearing from February 24, through February 28, 1986.

3. That your deponent further was involved in the decision to select a neutral, detached hearing officer who was not from the area and was otherwise unfamiliar with the local controversy surrounding this case.

4. That on or about March 26, 1986, your deponent received the report and recommendations of Hon. John Clyne, designated hearing officer.

5. That based on my review of said report and recommendations together with my knowledge of the pending proceedings as I was kept informed thereof by the Corporation Counsel and the Commissioner of Public Safety, I decided that it was appropriate to adopt Judge Clyne's report in its entirety and dismiss Petitioner Fraccola from the Utica Police Department and enter a finding of not guilty for Officers Gentile and Paccillio, who were similarly charged.

6. That on the next day, March 27, 1986, your deponent received a copy of the nine hundred (900) page transcript of the disciplinary hearing. I immediately reviewed the same over the next few days. A review of this transcript only served to confirm what I had already been advised by the Commissioner of Public Safety and Corporation Counsel and only served to re-enforce the desirability of my decision to adopt Judge Clyne's recommendations in their entirety.

7. That I am now advised by Corporation Counsel Festine, that Petitioner Fraccola is complaining that I prejudged this case without proper review of the hearing officer's report and recommendations. I can state unequivocally that this is false and I have fully reviewed all of the appropriate material in this case.

WHEREFORE, your deponent respectfully requests that an Order be made and entered accordingly.

s/ Louis LaPolla

Louis LaPolla

Sworn to before me this 25th day of August 1986. Armond Festine, Notary Public - Oneida County Comm. Exp. 3/30/87.